

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TAMMY MAY, as next friend of)
ANDREW MAY,)

Plaintiff,)

v.)

C.A. No. 04C-08-270 FSS

REMINGTON ARMS COMPANY,)
INC., SPORTING GOODS)
PROPERTIES, INC., and E.I.)
DUPONT DE NEMOURS and)
COMPANY,)

Defendants.)

Submitted: May 6, 2005

Decided: August 31, 2005

MEMORANDUM OPINION

William W. Erhart, Esquire, 800 King Street, Suite 302, Wilmington,
Delaware, 19801. Attorney for Plaintiff.

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Box 951, 1313 N. Market Street, Wilmington, Delaware, 19899. Attorney
for Defendants.

SILVERMAN, J.

Although this is a products liability case, its outcome turns on whether North Carolina's shorter statute of repose or Delaware's longer statute of limitation applies. In 2002, Plaintiff, a North Carolina resident, was seriously injured in North Carolina by a product manufactured in New York, in 1994, by Defendants, related Delaware corporations. Under North Carolina's statute of repose, Plaintiff's claim expired a year before he was hurt. Under Delaware's statute of limitations, however, Plaintiff had two years after his injury to file suit, which he did in the nick of time.

For now, the facts are undisputed and they need little elaboration. It is conceded for present purposes that the product, a Remington Model 700 bolt action rifle, was defective and dangerous, the manufacturer has known of the defect for many years and the rifle's service life far exceeded the time between its manufacture and Plaintiff's injury.

I. Delaware's "Borrowing Statute" Applies:

Defendants have moved for summary judgment, contending that North Carolina's statute of repose not only prohibits Plaintiff from bringing suit in North Carolina, it also extinguishes any claim arising out of the rifle's manufacture. And, according to Defendants, there is no basis for applying Delaware's tort law in a personal injury case that arose someplace else.

Delaware’s “borrowing statute”¹ addresses whether Delaware’s statute of limitations applies or the court should borrow and apply another state’s time limit. The law provides:

Where a cause of action arises outside of [Delaware], an action cannot be brought [here] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state. . .where the cause of action arose, for bringing an action upon such cause of action.

In other words, if Plaintiff’s cause of action arose in North Carolina, if North Carolina’s statute of repose is a time limit, and if its six- year-after manufacture limit expires before Delaware’s two-year-after-injury time limit expires, then the court must apply North Carolina’s statute and Plaintiff cannot bring suit here. Plaintiff offers three reasons why the borrowing statute does not apply:

1. The law does not apply to statutes of repose, such as North Carolina’s and ;
2. It is against Delaware’s public policy to apply an “arbitrary” six-year cutoff on a products liability claim;
3. Not allowing Plaintiff to sue here is unacceptable to the Delaware Constitution’s Due Process and

¹DEL. CODE ANN. tit. 10, § 8121(1999).

Remedy for Injury Clause.²

The court rejects Plaintiff's reasoning.

First, Delaware's borrowing statute applies. Plaintiff's cause of action arose either where the defective rifle was manufactured – New York, where Plaintiff bought it – North Carolina, or where he was injured – again, North Carolina. Plaintiff's cause of action did not arise here. Delaware's only tie to what happened is the fact that Defendants are incorporated here.

For borrowing purposes, there is no helpful distinction between statutes of repose and limitation. If there were a distinction, taking into account the borrowing statute's thrust the borrowing statute is even more applicable where a foreign statute of repose is concerned. A statute of repose is a time limit on suit, and then some. It actually extinguishes the cause of action.³ Thus, Plaintiff not only is barred from filing suit, he has no claim in North Carolina, which is the place where he lives, where he bought the defective rifle and where he was hurt.

Second, it is not against Delaware's public policy to borrow North Carolina's statute of repose here. Plaintiff tacitly recognizes that Delaware's General Assembly struck a different balance between injured people's and

²DEL. CONST. of 1897, art. I, §9.

³See *Cheswold Volunteer Fire Co. v. Lambertson Construction Co.*, 489 A.2d 413, 421 (Del. 1984) (explaining: "While the running of a statute of limitations will nullify a party's remedy, the running of a statute of repose will extinguish both the remedy and the right.").

manufacturers' rights compared to North Carolina's legislature's approach. In Delaware, the two-year period for filing suit begins to run after the injury. In North Carolina, six years after a product is manufactured, the manufacturer has repose. In the end, if Delaware favors its longer-from-purchase (indefinite)/shorter-from-injury (two year) time limit, it cannot be said that North Carolina's shorter-from-purchase(six years)/longer-from-injury (six years) approach is unreasonable.

Third, Delaware's borrowing statute is constitutionally acceptable on its face and as applied here. Plaintiff argues that statutes of repose are unconstitutional because they "they eliminate a cause of action for some victims." That is circular. More importantly, *Cheswold Volunteer Fire Co.*⁴ holds that the legislature has the power to extinguish common law rights through a statute of repose. But the power "must be exercised in conformity with the dictates of due process."⁵ Therefore, the question presented is whether a challenged statute of repose affords due process to the challenger. "[D]ue process preserves a right of action which has accrued or vested before the effective date of the statute."⁶ Here, no vested or accrued right is at issue.

⁴*Id.* at 416-419.

⁵*Id.* at 418. *See also Cheswold Volunteer Fire v. Lambertson Const.*, 462 A.2d 416, 421- 424 (Del. Super. 1983) (providing what the Delaware Supreme describes at 489 A.2d 416 as an "extensive and scholarly" analysis of similar arguments to those presented here).

⁶*Id.*

Moreover, North Carolina's statute of repose is constitutional under North Carolina's constitution.⁷ Thus, borrowing North Carolina's statute of repose does not offend article I, section 9 of our constitution.

II. Delaware Has the Least Significant Relationship to This Case:

If the borrowing statute does not apply, which it does, the court must look to Delaware's general, choice-of-law rules in order to decide whether to apply Delaware's statute of limitations or North Carolina's statute of repose. Plaintiff seems to recognize that absent a statutory directive as to choice of law, such as an applicable borrowing statute, the court should apply the Restatement (Second) of Conflicts §145 (1971), which sets out the "most significant relationship test."⁸ Applying the test:

1. The injury occurred in North Carolina;
2. The conduct causing the injury happened in New York;
3. Plaintiff resides in a North Carolina and Defendant is a Delaware corporation, or its subsidiary; and
4. The relationship between the parties, if any exists, is centered in North Carolina.

Unfortunately for Plaintiff, the outcome of the "most significant relationship

⁷*Tetterton v. Long Mfg. Co.*, 332 S.E.2d 67 (N.C. 1985).

⁸*Turner v. Lipschultz*, 619 A.2d 912, 914-915 (Del. 1992).

test” clearly calls for the court to apply North Carolina’s statute of repose.

The court appreciates that applying North Carolina’s law leaves Plaintiff without a right and a remedy. By the time the rifle injured Plaintiff, it was too late to sue. That, however, is the outcome called for by the state law in the place where Plaintiff lives, where the rifle was bought, where it was and where he was injured by it. When Plaintiff bought the rifle in North Carolina and he continued using it after six years, he lost the right to sue the rifle’s manufacturer under North Carolina’s law. The only reason Plaintiff wishes to proceed in Delaware is to avoid his home state’s law.

III. Conclusion

For the foregoing reasons, Defendant’s Motion for Summary Judgement is **GRANTED**.

IT IS SO ORDERED.

Judge Fred S. Silverman

Orig: Prothonotary
cc: Counsel